80-144 In The

Supreme Court of the United States

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October Term, 1980

No.

UNITED FEDERATION OF TEACHERS WELFARE FUND,

Appellant,

vs.

STATE HUMAN RIGHTS APPEAL BOARD AND STATE DIVISION OF HUMAN RIGHTS ON THE COMPLAINT OF PAULA FOSTER,

Appellees,

and

PAULA FOSTER,

Intervenor.

On Appeal from the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

QUESTION PRESENTED

Whether the Employee Retirement Income Security Act of 1974 ("ERISA") preempts the New York State Division of Human Rights from requiring the Fund to provide disability, medical and other benefits to pregnant persons who are in an inactive leave status from their employer, when such benefits are not provided to nonpregnant persons who are similarly situated.

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ORDERS BELOW

The order of the New York Court of Appeals dated April 29, 1980, which is not yet reported, appears in the Appendix hereto at page 1a.

The order of the Appellate Division of the New York Supreme Court, First Department, dated March 4, 1980, which is unreported, appears in the Appendix hereto at page 3a.

The order of the Appellate Division of the New York Supreme Court, First Department, dated December 18, 1979, which is unreported appears in the Appendix hereto at page 5a.

The order of the State of New York Division of Human Rights, dated May 26, 1976, which is unreported, appears in the Appendix hereto at page 7a.

The order of the State Human Rights Appeal Board, dated February 21, 1978, which is unreported, appears in the Appendix hereto at page 15a.

The other summary orders previously issued herein are *United Federation of Teachers Welfare Fund v. State Human Rights Appeal Board,* 53 App. Div. 2d 808 (1st Dept. 1976), *appeal denied,* 40 N.Y. 2d 809 (1977); *United Federation of Teachers Welfare Fund v. State Human Rights Appeal Board,* 59 App. Div. 2d 826 (1st Dept. 1977), *appeal denied,* 44 N.Y. 2d 641, *cert. denied,* 439 U.S. 834 (1978); *United Federation of Teachers Welfare Fund v. State Human Rights Appeal Board,* 64 App. Div. 2d 514 (1st Dept.), *appeal denied,* 46 N.Y. 2d 706 (1978).

JURISDICTION

The order of the State of New York Court of Appeals was entered on April 29, 1980. A notice of appeal to this Court was duly filed in the State of New York Court of Appeals on July 25, 1980, and appears in the Appendix hereto at page 17a. This appeal is being docketed in this Court within ninety (90) days from the date of the entry of judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

STATUTES INVOLVED

The statutes involved herein are New York State Executive Law (Human Rights Law), Article 15, Sections 296.1(a) and (c); 29 U.S.C. §1003(a); 29 U.S.C. §1002(3); and 29 U.S.C. §1144, reproduced in the Appendix hereto at page 19a.

STATEMENT OF THE CASE

This is an appeal from the refusal of the New York State Court of Appeals to review the order of the Appellate Division, First Department, dated December 18, 1979, which confirmed the decision and order of the New York State Division of Human Rights ("Division") and the Human Rights Appeal Board ("Appeal Board") requiring the Fund to provide disability, medical and other benefits to all pregnant persons retroactive to May 26, 1976, despite the fact that nonpregnant persons similarly situated did not receive such benefits, and notwithstanding the Fund's contention that the Division and the Appeal Board were preempted from requiring the Fund to provide such benefits under 29 U.S.C. §1144(a).

The Fund is an employee welfare benefit plan established by the United Federation of Teachers ("UFT") to provide benefits to teachers and other employees covered by collective bargaining agreements between the UFT and the City of New York ("City"). The benefits provided by the Fund are designed to

supplement those provided to the employees directly by the City. The Fund's sole source of funding are contributions paid by the City pursuant to its collective bargaining agreements with the UFT.

Under the rules of eligibility established by the Fund, employees are eligible for benefits during periods that they are in an active employment status with the City. Active employment status is defined by the Fund as being that period during which the City is required to make contributions to the Fund on the employee's behalf. Active status includes periods of actual employment, as well as certain types of approved leave.

Employees who become pregnant are entitled to take a leave from their City employment if they wish to do so. If they are disabled they may take sick leave. If they are not disabled they may elect to take maternity leave. The City is required to make contributions to the Fund on behalf of pregnant employees on sick leave, but it is not required to do so for those on maternity leave. Under the Fund's rules of eligiblity, pregnant employees on sick leave remain in active status and are eligible for all benefits; pregnant employees on maternity leave are not in active status and their eligibility for benefits terminates.

Thus, women on maternity leave are treated in the same manner as all other employees on inactive leave status. Just as male teachers who become disabled while on unpaid sabbatical leave (during which the City is not required to make contributions to the Fund) are not eligible for benefits, so female employees on maternity leave are similarly not eligible for benefits.

The Division and Appeal Board found that in denying benefits to pregnant teachers on maternity leave the Fund was unlawfully discriminating against women based on their sex, and ordered that benefits be provided to all such persons, retroactively to May 26, 1976. In making this order, the Division

and Appeal Board rejected the Fund's contention that its rules were nondiscriminatory, and its argument that the Division was preempted under ERISA from requiring the Fund to provide such benefit coverage.

The Fund has raised the issue of ERISA preemption from the beginning of the litigation herein. This argument has been asserted before the Appellate Division as a basis for reversing the Division's order, and before the Court of Appeals as a basis for granting leave to appeal to that court. While the issue has never been expressly addressed in any opinion of the Division or the state courts, the Fund's petition for reversal of the order and its motions for leave to appeal have all been denied.

THE QUESTION IS SUBSTANTIAL

This case presents an important question involving the interpretation of a federal statute. The legislative history of ERISA makes clear that it was the intention of Congress to preempt state regulation of employee benefit plans such as the Fund. The disregard of this clear statutory mandate by the New York State administrative agencies and courts seriously impedes the effective operation of the federal law, and is completely inconsistent with the purposes and policies of that law.

The interpretation of the preemption provision and its effect on state fair employment laws as they relate to employee benefit plans has been the subject of extensive recent litigation, some of which has reached this Court. *See Pervel Industries, Inc. v. State of Connecticut Commission on Human Rights and Opportunities,* 468 F. Supp. 409 (D. Conn. 1978), *aff'd,* 603 F. 2d 214 (2nd Cir. 1979), *cert denied,* __U.S.__, 62 L. Ed. 2d 667 (January 14, 1980); *Bucyrus-Erie Co. v. Dept. of Industry, Labor and Human Relations of the State of Wisconsin,* 559 F. 2d 205 (7th Cir. 1979), *cert. denied,* __U.S.__, 62 L. Ed. 2d 667 (January 14, 1980); *Minnesota Mining and Manufacturing Co. v. Minnesota,* __U.S.__, 62 L. Ed. 2d 726 (1980), *dismissed for*

want of a substantial federal question; and *Mountain States Telephone & Telegraph Co. v. Commissioner of Labor and Industry of Montana,* __U.S.__, 63 L. Ed. 2d 754 (1980), *dismissed for want of a substantial federal question.*

The result of these cases is that inconsistent lower court decisions on the effect of the ERISA preemption provision have been left standing. In view of the importance of the question presented, an opinion of this Court resolving the issue would greatly advance the administration and implementation not only of the federal statute, but of all state fair employment laws as well.

ARGUMENT

I.

THE FAILURE OF THE NEW YORK ADMINISTRATIVE AGENCIES AND COURTS TO GIVE EFFECT TO THE ERISA PREEMPTION PROVISION NULLIFIES AN EXPRESS PRIMARY CONGRESSIONAL PURPOSE TO ACHIEVE NATIONAL UNIFORMITY OF REGULATION OF EMPLOYEE BENEFIT PLANS.

A. The paramount importance of uniformity to ERISA's national regulatory objectives is unmistakable.

There can be no question but that Congress, upon careful deliberation, accorded primacy to the objective of protecting national employers from inconsistent state regulation of employee benefit plans.

The Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 *et seq.*, contains a broad preemption provision which states in pertinent part:

> "Except as provided in subsection (b) of this section, the provisions of this subchapter and

> subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to *any employee benefit plan* described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975." 29 U.S.C.§1144. (Emphasis added.)

The term "State law" in the preemption provision includes "all [State] laws, decisions, rules, regulations, or other State action having the effect of law". 29 U.S.C. §1144(c)(1).[1]

An *employee benefit plan,* as defined in ERISA, includes:

> "any plan, fund or program . . . established or maintained by an employer or by an employee organization, or by both . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . medical, surgical or hospital care or benefits, or benefits in the event of *sickness, accident, disability,* death or unemployment . . . . " 29 U.S.C. §1002(1) and (2). (Emphasis added.)

---

1. 29 U.S.C. §1144(c) and (d) states:

> "For purposes of this section:
>
> (1) The term 'State Law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.
>
> (2) The term 'State' includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter."

Pub. L. 93-106, Title I, §514, Sept. 2, 1974, 88 Stat. 897, 29 U.S.C. §1144.

The only state laws specifically exempted from ERISA preemption are laws which regulate insurance, banking or securities.[2] 29 U.S.C. §1144(2)(A).

The legislative history of ERISA demonstrates that the broad coverage of the preemption provision was not accidental but designed to preempt all state law regulating employee benefit plans, with the sole exception of those areas specifically exempted.[3]

Specifically, the history reveals a purpose which supports the comprehensive preemption provision:

---

2. Employee benefit plans "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws" are exempted from coverage by ERISA and are therefore subject to State law. 29 U.S.C. §1003(b).

3. ERISA as proposed in Congress originally had a much narrower preemption provision. For example, ERISA as originally introduced in the House of Representatives stated with respect to preemption:

> "EFFECT ON OTHER LAWS
> SEC. 114. It is hereby declared to be the express intent of Congress that except for actions authorized by section 106(e)(1)(B) of this Act, the provisions of this Act shall supersede any and all laws of the State and of political subdivisions thereof insofar as they may now or hereafter *relate to the fiduciary, reporting, and disclosure responsibilities of persons acting on behalf of employee benefit plans: Provided* that nothing herein shall be construed to exempt or relieve any person from any law or any State which regulates insurance, banking, or securities or to prohibit a State from requiring that there be filed with a State agency copies of reports required by this Act to be filed with the Secretary." (Emphasis added.) H.R. 2, 93d Cong., 1st Sess. (1973).

The original Senate version of the ERISA legislation was contained in S. 4, introduced on January 4, 1973, and that bill proposed that ERISA supersede State law which related "to the *subject matters* regulated by this Act." *See*, S. 3, Sec. 609(a).

> "Finally, it is evident that the operations of employee benefit plans are increasingly interstate. The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying State laws." H.R. Rep. No. 533, 93d Cong., 1st Sess., 12 (1973).

During the initial stages of legislative action regarding ERISA, a conflict developed between the Senate and House versions. A Joint Conference Committee appointed to resolve the conflict adopted the present preemption provisions. The Joint Committee Report stated with respect to ERISA preemption of state law:

> "*Preemption of State laws (Sec. 514 of the bill)*
>
> Under the substitute, the provisions of Title I are to supersede all State laws that relate to any employee benefit plan that is established by an employer engaged in or affecting interstate commerce or by an employee organization that represents employees engaged in or affecting interstate commerce. (However, following title I generally, preemption will not apply to government plans, church plans not electing under the vesting, etc., provisions, workmen's compensation plans, non-U.S. plans primarily for non-resident aliens, and so-called 'excess benefit plans.')." S.R. 93-1090, 93d Cong., 2d Sess. 383 (1974).

In addition to the revisions of the original preemption provision and the Joint Committee Report, Legislative history on the floor of the House and the Senate, including explanations

by the sponsors, emphasizes the extensive scope of ERISA's preemption.[4]

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4. Congressman Dent, in explaining the Joint Committee changes to the House version, stated with regard to the preemption provision:

> "Finally, I wish to make note of what is to many the *crowning achievement of this legislation, the reservation to Federal authority of the sole power to regulate the field of employee benefit plans.* With the preemption of the field, we round out the protection afforded participants by eliminating the *threat of conflicting and inconsistent State and local regulation.*
>
> * * *
>
> the conferees, with the narrow exceptions specifically enumerated, *applied this principle in its broadest sense to foreclose any non-Federal regulation of employee benefit plans.*" 120 Cong. Rec. 29197 (1974).

Senator Williams gave a similar report to the Senate:

> "It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute *are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State* or local government, or any instrumentality thereof, which have the force or effect of law." (Emphasis added.) 120 Cong. Rec. 29933 (1974).

Senator Javits, a prime spokesman in originally holding hearings and sponsoring pension reform legislation and a member of the Joint Conference Committee, made the following statement in explaining the preemption provision and why the broad preemption was preferred over a limited preemption:

> "*. . . the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs.*" (Emphasis added.) 120 Cong. Rec. 29942 (1974).

Senator Javits' statement concerning the need for evaluating ERISA's impact also indicates the breadth of the preemption clause.

> "The conferees — recognizing the dimensions of such a policy — also agree to assign the Congressional Pension Task Force the responsibility of studying and evaluating preemption in connection with State authorities and reporting its findings to the Congress. If it is determined that the preemption policy devised has the effect of precluding essential legislation at either the State or Federal level, appropriate modifications can be made." 120 Cong. Rec. 29942 (1974).

In light of this conscious decision to risk overbreadth in the interest of achieving national regulatory uniformity, it cannot seriously be disputed that Congress intentionally selected the tool of categorical express preemption to achieve its primary goal of facilitating speedy implementation of ERISA's provisions by minimizing confusion caused by overlapping state regulation.

B. The New York administrative agencies and courts have ignored the preemption provision of ERISA and have thereby undermined the clear congressional mandate.

The issue of ERISA preemption has been repeatedly presented to the New York administrative agencies and courts and has been consistently ignored by them. *See State Division of Human Rights v. Jamestown Telephone Corporation,* 42 N.Y. 2d 848; *Westinghouse Electric Corporation v. State Human Rights Appeal Board,* 60 A.D. 2d 943, *appeal dismissed* 44 N.Y. 2d 731, *cert. denied* 439 U.S. 1073; and *Liberty Mutual Insurance Company v. State Division of Human Rights,* 61 A.D. 2d 822, 44 N.Y. 2d 644. Since the New York State

administrative agencies and courts have clearly demonstrated their unwillingness to give effect to the ERISA preemption provision, the mandate to do same must come from this Court.

CONCLUSION

It is no exaggeration that at issue in these proceedings is the power of the federal legislature to decide to preempt state law-making relative to a particular subject even absent clear indication of conflict between federal and state laws. Specifically, at issue is whether New York—and other states in like position—should be permitted to thwart ERISA's clearly articulated policy of assuring national uniformity of regulation of employee benefit plans.

The issue is not whether state employment antidiscrimination laws should be broadly adopted but, rather, whether those laws should yield to federal regulation only insofar as they relate to employee benefit plans. In view of the present inconsistent lower court decisions on this question, and the importance of the question generally, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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HERMANN & KREISBERG, P.C.
Attorneys for Appellant

APPENDIX

ORDER OF NEW YORK COURT OF APPEALS DATED APRIL 29, 1980

STATE OF NEW YORK

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-ninth day of April A.D. 1980

PRESENT, Hon. Lawrence H. Cooke, *Chief Judge, presiding.*

Mo. No. 440

In the Matter of United Federation of Teachers Welfare Fund,

Appellant,

vs.

State Human Rights Appeal Board and State Division of Human Rights on Complaint of Paula Foster,

Respondents,

and Paula Foster,

Intervenor-Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed

Order of New York Court of Appeals Dated April 29, 1980

from does not finally determine the proceeding within the meaning of the Constitution.

s/ Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

ORDER OF APPELLATE DIVISION, FIRST DEPARTMENT DATED MARCH 4, 1980

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on March 4, 1980

Present—Hon. Francis T. Murphy, Jr., Presiding Justice
Arnold L. Fein
Joseph P. Sullivan
David Ross
Max Bloom
Justices

M246

United Federation of Teachers Welfare Fund,

Petitioner,

-against-

State Human Rights Appeal Board and State Division of Human Rights on the complaint of Paula Foster,

Respondents,

and

Paula Foster,

Respondent-Intervenor.

The above-named petitioner having moved for reargument of, or for leave to appeal to the Court of Appeals from, the order of this Court entered December 18, 1979,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in support of

Order of Appellate Division, First Department Dated March 4, 1980

said motion, and the papers filed in opposition or in relation thereto; and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is denied with $20 costs.

ENTER:

JOSEPH J. LUCCHI
Clerk

ORDER OF APPELLATE DIVISION, FIRST DEPARTMENT DATED DECEMBER 18, 1979

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 18, 1979

Present—Hon. Francis T. Murphy, Jr., Presiding Justice
Arnold L. Fein
Joseph P. Sullivan
Max Bloom
David Ross
Justices

United Federation of Teachers Welfare Fund,

Petitioner,

-against-

State Human Rights Appeal Board and State Division of Human Rights on the Complaint of Paula Foster,

Respondents,

and

Paula Foster,

Respondent-Intervenor.

M-3905

An order of this Court having been made and entered on August 2, 1979 granting intervenor's motion to hold petitioner in contempt of court for its failure to comply with the order of this Court entered June 5, 1979 and permitting petitioner to purge itself of such contempt upon compliance with the order of June 5, 1979,

Order of Appellate Division, First Department Dated December 18, 1979

And the respondent State Division of Human Rights having moved this Court for an order scheduling a hearing to determine penalties to be assessed against petitioner for its contempt of the orders of this Court entered on June 5, 1979 and July 6, 1978 or, in the alternative, assigning a single judge to determine the contempt penalties and otherwise supervise enforcement proceedings,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in support of said motion and the papers filed in opposition or in relation thereto; and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is granted only to the extent of amending the order of this Court entered on August 2, 1979 (M-2674) so as to direct that petitioner's compliance with paragraphs 5, 6 and 7 of the State Division's order dated May 26, 1976 be retroactive to said date and that petitioner shall have thirty days from the date of entry of this order to comply as aforesaid.

ENTER:

JOSEPH J. LUCCHI
Clerk

ORDER OF STATE OF NEW YORK DIVISION OF HUMAN RIGHTS DATED MAY 26, 1976

STATE OF NEW YORK: EXECUTIVE DEPARTMENT

STATE DIVISION OF HUMAN RIGHTS

CASE NO. (S) GCS-33448-74

STATE DIVISION OF HUMAN RIGHTS on the complaint(s) of PAULA FOSTER,

Complainant,

-against-

NEW YORK CITY BOARD OF EDUCATION; UNITED FEDERATION OF TEACHERS, AFL-CIO UNITED FEDERATION OF TEACHERS WELFARE FUND; AND H.R. LIZZA, ADMINISTRATOR,

Respondents.

PROCEEDINGS IN THE CASE

On the 13th day of May, 1974, the above-named Complainant filed a verified complaint with the State Division of Human Rights (hereinafter the "Division") charging the above-named Respondents with an unlawful discriminatory practice relating to employment, in violation of the Human Rights Law (Executive Law, Article 15) of the State of New York.

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondents had engaged in an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

Order of State of New York Division of Human Rights Dated May 26, 1976

After due notice, the case came on for hearing before, Irwin H. Pantell, Esq., a Hearing Examiner of the Division. The hearing was held June 6, July 24 and October 29, 1975.

Complainant and Respondents appeared at the hearing. Complainant was represented by James J. Foster, Esq. Respondent New York City Board of Education was represented by W. Bernard Richland, Corporation Counsel, by Allen F. London, Esq., of Counsel. Respondents United Federation of Teachers, United Federation of Teachers Welfare Fund and H.R. Lizza, were represented by Mirkin, Barre, Saltzstein & Gordon, P.C., by Robert M. Ziskin, Esq., of Counsel. The State Division of Human Rights submitted a statement in lieu of appearance.

FINDINGS OF FACT

1. Complainant Paula Foster, is a female who has been employed as a teacher by the Respondent New York City Board of Education (hereinafter the "Board") since September, 1966 and at all times herein pertinent.

2. Complainant became pregnant and because of a resultant inability to work she applied to Respondent Board for maternity leave to commence February 1, 1974, which application was granted.

3. In accordance with Complainant's accrued sick leave, Respondent Board granted her "paid sick leave against 19 borrowed days from February 1, 1974 through March 1, 1974, and absence without pay from March 2, 1974 through April 1, 1974." In addition thereto said Respondent, in accordance with its rules, allowed Complainant to retain health insurance coverage through July 21, 1974 and granted her 41 paid vacation days for the summer of 1974.

Order of State of New York Division of Human Rights Dated May 26, 1976

4. Complainant gave birth by emergency Caesarean section on June 9, 1974 and was unable to resume the duties of a teacher prior to July, 1974.

5. The Respondent United Federation of Teachers, AFL-CIO (hereinafter "UFT") is a labor organization representing teachers including Complainant, employed by Respondent Board. Respondent H.R. Lizza, at all times herein pertinent, was the Director of the Respondent United Federation of Teachers' Welfare Fund (hereinafter "Fund") and responsible for the administration of the Fund under the direction of its Board of Trustees.

6. The Respondent Fund was established as a result of collective bargaining between Respondent UFT and Respondent Board, to provide certain medical, dental and allied health benefits to covered employees and eligible dependents including the spouse of an employee, and as such is a labor organization within the meaning and intent of the Human Rights Law.

7. The collective bargaining agreement in effect, at all times herein pertinent, between Respondent Board and UFT provided in pertinent part that "The Board agrees to arrange for, and make available to each day school teacher, a choice of health and hospital insurance coverage . . . and the Board agrees to pay the full cost of such coverage." The agreement also stated that "The Board will provide funds . . . for the purpose of making available for each day school teacher supplemental welfare benefits under a plan to be devised and established jointly by representatives of the Union and the Board."

8. The nature of the benefits is determined by the trustees of the Respondent Fund and any changes in benefits require approval of the Respondent Board.

Order of State of New York Division of Human Rights Dated May 26, 1976

9. At least some members of the Board of Trustees of the Respondent Fund are officers of the Respondent UFT.

10. Payments are made by Respondent Board to Respondent Fund on the basis of a payroll count. The Board only makes such payments for those persons on active status on the payroll. An applicant who is otherwise eligible is entitled to payments from the Respondent Fund regardless of membership in Respondent UFT.

11. The rules of the Respondent Fund provide that in order to be eligible for its benefits, an applicant must be on the Respondent Board's payroll at the time expenses are incurred. An employee on authorized sick leave without pay (leave of absence for restoration of health) is considered to be on active status under the eligibility rules. It was stipulated that Complainant never received a leave of absence for restoration of health.

12. The Complainant's last day of active status was March 31, 1974. Her last day of paid sick leave (accrued and borrowed) was March 1, 1974.

13. On or about March 26, 1974, Complainant applied to the Respondent Fund for disability benefits which were denied to her on or about April 2, 1974, because her disability arose out of a pregnancy.

14. Thereafter, Complainant applied to Respondent Fund for dental benefits in connection with a covered condition which arose in or about April, 1974, and same were rejected.

15. On or about September 9, 1974, Complainant submitted a claim to Respondent Fund in connection with a covered dental condition incurred by her husband on about July 15, 1974 and same was rejected.

Order of State of New York Division of Human Rights Dated May 26, 1976

16. Between February 1, 1974 and July 21, 1974, Complainant incurred medical expenses for which she was covered by Blue Cross insurance except for a $50 deductible expense. Complainant applied to Respondent Fund for reimbursement and her claim was rejected.

17. At all times herein pertinent, the rules of the Respondent Fund's disability plan provided that no benefit shall be paid "for any period of disability due to pregnancy, or resulting childbirth, miscarriage or abortion." Benefits were provided to eligible members in the amount of $100 per week to a maximum of 28 weeks commencing with the first day of sickness or disability following 4 weeks after exhaustion of the sick bank reserve and removal from the Board of Education payroll.

18. An employment provision or union or labor organization regulation with regard to fringe benefits including health, and disability insurance which singles out pregnant women for different treatment, constitutes a discriminatory practice based upon sex.

19. The exclusion of disability benefits for pregnancy connected disabilities in the Workmen's Compensation Law, Section 200 et seq., relates to payments of benefits pursuant to that statute; it cannot be used to justify failure to accord equal treatment to females in the terms, conditions and privileges of employment required by the Human Rights Law.

20. A pregnancy related disability must be treated the same as any other physical disability in determining whether a person is entitled to receive any fringe benefits.

21. I find that the policy of the Respondents, Board, U.F.T. and Fund discriminated against the Complainant in the terms, conditions and privileges of employment because of her sex, in

violation of the Human Rights Law, by failing to reimburse her for covered medical and dental expenses incurred by Complainant and her husband from April, 1974 through July, 1974.

22. Complainant was unlawfully deprived of disability benefits to the extent that same were accrued and not granted to cover the period of disability from March 30, 1974 through June 30, 1974.

23. There is no evidence that Respondent H.R. Lizza, individually committed any unlawful discriminatory act against Complainant or that he acted in other than a representative capacity in the instant matter.

DECISION

On the basis of the foregoing, I find that the Respondents, New York City Board of Education, United Federation of Teachers, AFL-CIO, and United Federation of Teachers Welfare Fund, discriminated against Complainant because of her sex in the terms, conditions and privileges of her employment, in violation of the Human Rights Law.

On the basis of the foregoing, I further find that Respondent H.R. Lizza did not commit any unlawful discriminatory act against Complainant.

On the basis of the foregoing, I further find that the awarding of compensatory damages to the aggrieved Complainant will effectuate the purposes of the Human Rights Law.

ORDER

Upon the basis of the foregoing Findings of Fact and pursuant to the Human Rights Law, it is hereby

Order of State of New York Division of Human Rights Dated May 26, 1976

ORDERED, that the complaint against the Respondent H.R. Lizza be and the same is hereby dismissed, and it is further

ORDERED, that the Respondents, New York City Board of Education, United Federation of Teachers, AFL-CIO and United Federation of Teachers Welfare Fund, their agents, representatives, employees, successors and assigns shall cease and desist from discriminating against Complainant or any other employee or individual in the terms, conditions and privileges of employment because of the sex of such person, and it is further

ORDERED, that the Respondents, New York City Board of Education, United Federation of Teachers, AFL-CIO and United Federation of Teachers Welfare Fund, their agents, representatives, servants, employees, successors and assigns shall take the following affirmative action which will effectuate the purposes of the Human Rights Law:

1. The said Respondents shall reimburse Complainant for all covered dental expenses incurred by Complainant and her husband between April, 1974 and July, 1974. Such reimbursement to be made within thirty (30) days from the date Complainant submits to Respondents, bills or receipts in connection with such dental treatment.

2. In addition thereto the said Respondents shall pay to the Complainant the sum of $50 in reimbursement for the Blue Cross deduction made in connection with covered medical expenses through July, 1974. Such payment shall be made within thirty (30) days from the effective date of this Order.

3. In addition thereto, the said Respondents shall pay to the Complainant disability benefits in the amount of $1,300 to cover the period March 30, 1974 through June 30, 1974, plus interest at the rate of six percent per annum from May 15, 1974, a reasonable intermediate date in accordance with Section 5001 (b) of the CPLR.

Order of State of New York Division of Human Rights Dated May 26, 1976

4. Respondents shall furnish proof of the payments required in paragraphs 1 through 3, within ten (10) days after such payment is made to the State Division of Human Rights, 2 World Trade Center, New York, New York 10047, Attention Legal Bureau.

5. The Respondents shall provide disability benefits to females for pregnancy connected disabilities to the same extent such benefits are provided for other types of temporary physical disability.

6. The said Respondents shall send a memorandum to all supervisory employees, agents, representatives and officers, advising that each Respondent has a policy of non-discrimination because of sex in providing disability benefits for females (in accordance with paragraph 5) and all supervisory employees, agents, representatives and officers are required to implement such policy.

7. The said Respondents shall make available to the duly authorized representatives of this Division such information and documents as may be necessary for the Division to ascertain whether there is compliance with this Order.

DATED: May 2, 1976
New York, New York

STATE DIVISION OF
HUMAN RIGHTS

s/ Werner H. Kramarsky
WERNER H. KRAMARSKY
COMMISSIONER

ORDER OF STATE HUMAN RIGHTS APPEAL BOARD DATED FEBRUARY 21, 1978

STATE OF NEW YORK: EXECUTIVE DEPARTMENT

STATE HUMAN RIGHTS APPEAL BOARD

Case No. GCS-33448-74

Appeal No. 3542

STATE DIVISION OF HUMAN RIGHTS on the complaint of PAULA FOSTER,

COMPLAINANT-RESPONDENT

vs.

NEW YORK CITY BOARD OF EDUCATION; UNITED FEDERATION OF TEACHERS, AFL-CIO, UNITED FEDERATION OF TEACHERS WELFARE FUND,

RESPONDENTS-APPELLANT

and

H.R. LIZZA, ADMINISTRATOR,

RESPONDENT

The above-entitled appeal having been filed with this Board by Allen F. London, Esq., on behalf of New York City Board of Education and Mirkin, Barre, Saltzstein & Gordon, Esqs., Robert M. Ziskin, Esq., of Counsel on behalf of the United Federation of Teachers, AFL-CIO, and the United Federation of Teachers Welfare Fund, and the appeal having come on to be heard before Honorable Richard Wong and respondents-

Order of State Human Rights Appeal Board Dated February 21, 1978

appellant United Federation of Teachers, AFL-CIO and United Federation of Teachers Welfare Fund, having appeared by Mirkin, Barre, Saltzstein & Gordon, Esqs., Robert M. Ziskin, Esq., of Counsel, who argued and submitted a Supplemental brief on behalf of respondents-appellant and respondent-appellant New York City Board of Education, not having appeared and being deemed to have submitted on the record, and complainant-respondent having appeared by James J. Foster, Esq., who argued and submitted a brief on behalf of complainant-respondent, and the State Division of Human Rights having appeared by Beverly Gross, Esq., General Counsel, Ann T. Anderson, Esq., Senior Attorney, who submitted a letter in support of the Commissioner's Order, and

The Board having reviewed the record herein and having considered the arguments and briefs of the parties, and the letter in support of the Commissioner's Order, and a majority of the Board having decided that the Order appealed from herein is supported by substantial evidence on the record taken as a whole, and in conformity with the laws of the State of New York (Honorable Tibby Blum not participating), it is

ORDERED that the Decision and Order of the Commissioner of the State Division of Human Rights be, and the same hereby is in all respects affirmed.

STATE HUMAN RIGHTS
APPEAL BOARD

s/ Irma Vidal Santaella
Irma Vidal Santaella, Chairman

Dated & Mailed: February 21, 1978

TO: (see attached list)

NOTICE OF APPEAL FILED IN THE STATE OF NEW YORK COURT OF APPEALS

COURT OF APPEALS

STATE OF NEW YORK

UNITED FEDERATION OF TEACHERS WELFARE FUND,

Appellant,

vs,

STATE HUMAN RIGHTS APPEAL BOARD and STATE DIVISION OF HUMAN RIGHTS on the Complaint of PAULA FOSTER,

Appellee,

-and-

PAULA FOSTER,

Intervenor.

Notice is hereby given that UNITED FEDERATION OF TEACHERS WELFARE FUND, the appellant above-named hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York denying appellant's motion for leave to appeal the decision of the Appellate Division, First Department, affirming that the Federal Employee Retirement Income Security Act of 1974 (ERISA) does not preempt New York's regulation of UNITED FEDERATION OF TEACHERS WELFARE FUND's ERISA regulated employee welfare plan, entered in this action on April 29, 1980.

Notice of Appeal Filed in the State of New York Court of Appeals

This appeal is taken pursuant to 28 U.S.C. §1257 (2).

MIRKIN, BARRE,
SALTZSTEIN, GORDON,
HERMANN & KREISBERG, P.C.
Attorneys for Appellant
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(516) 466-6030 (212) 895-7160
Stephen F. Gordon, Esq. and
Jeffrey L. Kreisberg, *Of Counsel*

NEW YORK STATE EXECUTIVE LAW (HUMAN RIGHTS LAW) ARTICLE 15, SECTIONS 296.1(a) and (c)

§296. Unlawful discriminatory practices

1. It shall be an unlawful discriminatory practice:

(a) For an employer, because of the age, race, creed, color, national origin or sex of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

* * *

(c) For a labor organization, because of the age, race, creed, color or national origin or sex of any individual, to exclude or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer.

* * *

§1003. Coverage

(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained—

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

New York State Executive Law (Human Rights Law) Article 15, Sections 296.1(a) and (c)

(3) by both.

* * *

29 §1002

* * *

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan of a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

* * *

§1144. Other Laws

Supersedure; effective date

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Construction and application

(b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

New York State Executive Law (Human Rights Law) Article 15, Sections 296.1(a) and (c)

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services of facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

Definitions

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

New York State Executive Law (Human Rights Law) Article 15, Sections 296.1(a) and (c)

Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

(d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

Pub.L. 93-406, Title I, §514, Sept. 2, 1974, 88 Stat. 897.